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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/811,695

03/29/2004

Mark James Kline

9595

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27752 7590 09/24/2008  
THE PROCTER & GAMBLE COMPANY  
Global Legal Department - IP  
Sycamore Building - 4th Floor  
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EXAMINER

BOGART, MICHAEL G

ART UNIT

PAPER NUMBER

3761

MAIL DATE

DELIVERY MODE

09/24/2008

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.



<b>Office Action Summary</b>	<b>Application No.</b> 10/811,695	<b>Applicant(s)</b> KLINE ET AL.	
	<b>Examiner</b> MICHAEL G. BOGART	<b>Art Unit</b> 3761	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 19 June 2008.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-4,6,8-10,12-15 and 17-20 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-4,6,8-10,12-15 and 17-20 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 29 March 2004 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                     | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |



## **DETAILED ACTION**

### ***Request for Continued Examination***

A request for continued examination under 37 CFR 1.114 was filed in this application after appeal to the Board of Patent Appeals and Interferences, but prior to a decision on the appeal. Since this application is eligible for continued examination under 37 CFR 1.114 and the fee set forth in 37 CFR 1.17(e) has been timely paid, the appeal has been withdrawn pursuant to 37 CFR 1.114 and prosecution in this application has been reopened pursuant to 37 CFR 1.114. Applicant's submission filed on 19 June 2008 has been entered.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re*



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*Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-4, 6, 8-10, 12-15 and 17-20 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 3 and 5-20 of copending Application No. 10/811,696. Although the conflicting claims are not identical, they are not patentably distinct from each other because the '696 application teaches every element of the instant invention except for a second stretch region. Mere duplication of parts is not sufficient to patentably distinguish an invention over the prior art. See *In re Harza*, 274 F.2d 669, 124 USPQ 378 (CCPA 1960)

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.



***Claim Rejections – 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. § 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-4, 6, 8-10 and 17-20 are rejected under 35 U.S.C. § 102(b) as being anticipated by Drobin *et al.* (US 5,571,096 A; hereinafter “Drobin”).

Drobin teaches a unitary disposable absorbent article (20), comprising:

an absorbent core (28) having a garment-facing surface and a body-facing surface;

a liquid permeable topsheet (24) positioned adjacent said body-facing surface of said absorbent core (28);

a liquid impermeable backsheet (26) positioned adjacent said garment-facing surface of said absorbent core (28); said backsheet (26) having:

a laterally central region,

a first backsheet zone disposed within the laterally central region with a first particular basis weight, and

a second backsheet zone, disposed within the laterally central region and longitudinally outboard from the first backsheet zone, with a second particular basis weight;

at least one elastomeric element (34, 65) having at least one primary direction of stretch, said elastomeric element (34, 65) at least partially overlapping and joined to said second backsheet zone (col. 13, lines 1-8, incorporating by reference U.S. Pat. No. 4,515,595 to Kievet



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*et al.*, which discloses an elastomeric element which extends across the entire transverse width of the waist portions);

a first stretch region (34, 46) having lateral stretch; and

a second stretch region (34, 44) having lateral stretch; wherein said first stretch region is capable of co-elongating with said second stretch region (see annotated figure 2, *infra*, which has lines inserted to define the zones as interpreted herein).

The limitation concerning the co-stretchability of the elastic elements is functional.

While features of an apparatus may be recited either structurally or functionally, claims directed to an apparatus must be distinguished from the prior art in terms of structure rather than function, because apparatus claims cover what a device is, not what a device does (*Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469, 15 USPQ2d 1525, 1528 (Fed. Cir. 1990)). Thus, if a prior art structure is capable of performing the intended use as recited in the preamble, or elsewhere in a claim, then it meets the claim. MPEP § 2114. The elastic elements may be elongated simultaneously.

Drobin teaches that the apertures may be formed by cutting holes out of a film without forming cones, such that the apertures will have a caliper the same as the film thickness, which necessarily means that some material will be removed from the film leaving it with a decreased density and basis weight (col. 9, lines 28-30). The result is that the unperforated portion (82) of the backsheet (26) has a greater basis weight and density than the perforated portions (80). First backsheet zone (46) has a much larger area that is perforated than second backsheet zone.



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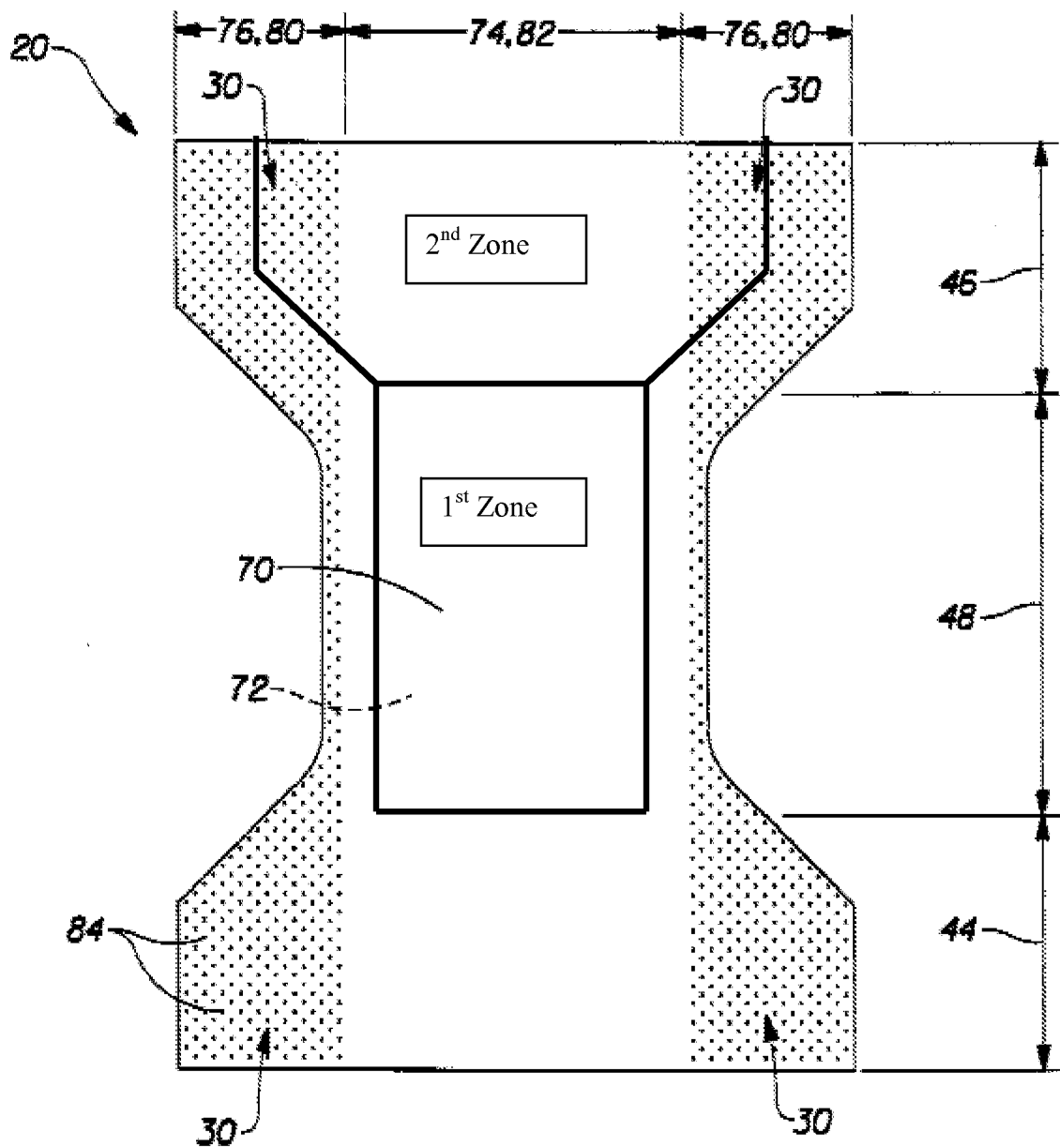


Fig. 2

Regarding claim 2, Dobrin teaches that the waist elastics (34) are attached in an elastically contractible condition (col. 10, line 63-col. 11, line 19; incorporating by reference Buell *et al.* (US 5,330,458)).



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Regarding claim 3, the first stretch region (34, 46) includes second backsheet zone (46).

Regarding claim 4, second stretch region (44) includes at least one ear (30).

Regarding claim 6, Dobrin teaches that the first backsheet zone and said second backsheet zone overlap the longitudinal axis (100).

Regarding claim 8, Dobrin teaches a front waist region (46), back waist region (44), a crotch region (48) a buttocks region (rear portion of crotch (48)) near rear waist region (44); said first backsheet zone (74) being primarily located in said crotch and front waist region (46), wherein the second backsheet zone (76) is located partially in the back waist region (44).

Regarding claim 9, Dobrin teaches a front waist region (46) back waist region (44), a crotch region (48) a buttocks region (rear portion of crotch (48)) near rear waist region (44); said first backsheet zone (74) being primarily located in said crotch and front waist region (46), wherein the second backsheet zone (76) is located partially in the buttocks region.

Regarding claim 10, the elastic member is curved in use as the diaper conforms to a wearer.

Regarding claim 14, Dobrin teaches a third backsheet zone (44), longitudinally outboard from the first backsheet zone (46) and longitudinally inboard to the second backsheet zone (46).

Regarding claim 17, Dobrin teaches that the rear waist elastics (34) are attached in an elastically contractible condition (col. 10, line 63-col. 11, line 19; incorporating by reference Buell *et al.* (US 5,330,458)).

Regarding claim 10, the elastic member is curved in use as the diaper conforms to a wearer.

Regarding claims 19 and 20, Dobrin teaches a diaper/pant.



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***Claim Rejections – 35 USC § 103***

The following is a quotation of 35 U.S.C. § 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. § 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. § 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. § 103(c) and potential 35 U.S.C. § 102(e), (f) or (g) prior art under 35 U.S.C. § 103(a).

Claims 12, 13, and 15 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Dobrin.

Dobrin does not teach the specific ratio of basis weights of the backsheet zones or the ratio of the relaxed length of the absorbent element to that of the backsheet.



Generally, differences in ranges of parameters will not support the patentability of subject matter encompassed by the prior art unless there is evidence indicating such concentration or temperature is critical. “[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation.” *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955).

A particular parameter must first be recognized as a result-effective variable, i.e., a variable which achieves a recognized result, before the determination of the optimum or workable ranges of said variable might be characterized as routine experimentation. *In re Antonie*, 559 F.2d 618, 195 USPQ 6 (CCPA 1977).

In the instant case, one of ordinary skill in the art would have recognized the benefits of optimizing the basis weight of various layers or the stretch characteristics of the elastic element as they affect how an absorbent article will fit on a wearer.

### ***Response to Arguments***

Applicant's arguments filed 19 June 2008 have been fully considered but they are not persuasive.

Applicants assert that Dobrin does not disclose a second backsheet zone of relatively lower basis weight disposed within a laterally central region of a backsheet. Applicants further assert that Dobrin's apertured zones are outside of the central region of the backsheet. This argument is not persuasive because the second zone is now considered to be the area defined in annotated fig. 2, *supra*, which contains the apertures. It is noted that applicants' specification



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describes the central region as overlapping the longitudinal centerline which is met by and does not preclude the interpretation used herein (see applicants' published application, US 2005/0215970, ¶s 0007 & 0049). Thus the unapertured first zone would have a higher basis weight than the apertured second zone.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to MICHAEL G. BOGART whose telephone number is (571)272-4933. The examiner can normally be reached on M-F, 10-6.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tatyana Zalukaeva can be reached on 571-272-1115. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Michael G. Bogart/



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Examiner, Art Unit 3761

/Tatyana Zalukaeva/

Supervisory Patent Examiner, Art Unit 3761